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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-423

PUYALLUP TRIBE, INC.,
and
RAMONA BENNETT,

Petitioners,

v.

DEPARTMENT OF GAME OF
THE STATE OF WASHINGTON,

Respondent,

and

NORTHWEST STEELHEADERS COUNCIL OF
TROUT UNLIMITED and GARY ELLIS,

Respondents.

RESPONSE TO A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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Respondents Northwest Steelheaders Council of Trout Unlimited and its president, Gary Ellis, who were granted intervenor

status in this case by the Superior Court of Washington on May 1, 1974, respectfully join petitioners in praying that a writ of certiorari issue to review the judgment of the Supreme Court of Washington entered in the above-entitled case upon denial of a motion for rehearing on June 25, 1976. Respondents pray that the entire judgment be reviewed by this Court, not just the one aspect singled out by petitioners.

OPINIONS BELOW

See the Petition of Puyallup Tribe, Inc., et al, and the Injunction Order of August 13, 1976 entered by the United States District Court for the Western District of Washington at Tacoma (Judge Boldt) appearing in Appendix A.

JURISDICTIONAL GROUNDS

See the Petition of Puyallup Tribe, Inc., et al, and the Complaint in Intervention of Northwest Steelheaders, et al, in the Superior Court appearing in Appendix B.

QUESTIONS PRESENTED

1. May the state of Washington manage the entire steelhead resource of the Puyallup River in the interest of conservation?

2. Should the hatchery steelhead on the Puyallup River which are paid for with the license fees and tags of sports fishermen be excluded from the commercial fishery of the Puyallup Tribe?

3. Does the treaty language "in common with all citizens of the territory" grant to the Puyallup Tribe any specific allocation of steelhead on the Puyallup River?

4. Does state management of the steelhead resource in the interest of conservation allow regulation of season, gear, and

area of fishing, rather than solely assuring an adequate escapement?

TREATIES AND STATUTES INVOLVED

See the Petition of Puyallup Tribe, Inc., et al.

COUNTER STATEMENT OF THE CASE

The steelhead is a sea-going rainbow trout which originates in Washington rivers, goes to sea, then returns almost always to the river of its birth to spawn and usually to die (Finding V; Tr 109). Since 1933, Washington state law has made steelhead a game fish to be caught only with hook and line RCW 77.08.020. The Department of Game of the State of Washington has "the responsibility for the management and conservation of the steelhead resource in this state," (Finding III; RCW 77.08.020 and 77.12.010). Most of the budget of the Department comes from the earmarked license fees paid

by sportsmen (Finding IV; Tr 162). Also since 1933, the Department of Game has operated a hatchery program for the artificial propogation of steelhead trout (Tr 147). The hatchery program for the Puyallup River is "virtually entirely financed" by sports fishermen (Finding X; Tr 143, 145, 240).

Northwest Steelheaders Council of Trout Unlimited (intervenor), the largest sports fishing organization in Washington, is dedicated to the conservation of steelhead trout and other fish. Gary Ellis (intervenor) is the Washington state president of the Northwest Steelheaders and a sports fisherman on the Puyallup River (Complaint in Intervention). There are about 150,000 licensed steelhead fishermen in Washington, of whom 5,171 fish the Puyallup River (Finding XIX; Ex 74-17; Tr 508).

Puyallup Tribe, Inc. is a corporation

composed of the 850 members of the Puyallup Tribe of Indians (Tr 755). The Puyallup reservation consisting of 18,000 acres at the first seven miles at the mouth of the Puyallup River was sold in 1903 except for 22 acres used as a cemetery (Finding XII in first trial). Members of the Tribe live in Tacoma, and other Washington cities and towns (Tr 939). Twenty tribal members regularly, 20 more part-time and 20 occasionally fish the Puyallup River commercially (Finding XV; Tr 758, 759). These 60 include in the number spouses and children and the official roll shows a total of 20 separate family names (Ex 7429). Puyallup Tribe members also fish with hook and line, and in accordance with Washington law do not pay the license fee paid by other hook and line fishermen (Tr 166, 761). Ramona Bennett is the chairperson of the Tribe (Tr 754).

In 1855 the United States and the ancestors of the Puyallup Tribe signed the Medicine Creek Treaty which included the following language:

> "The right of taking fish, at all usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the Territory" (10 Stat 1132)

The prior decisions of this Court established that members of the Puyallup Tribe, Inc. had the right to fish commercially for steelhead trout despite the Washington statute which made steelhead trout solely a game fish. These decisions also provided that the state of Washington had the right to regulate the tribal fishery in the interest of conservation. This case was remanded to decide whether hatchery fish were included within the 1855 Treaty, to determine a method of allocating the steelhead run on the Puyallup River between the Puyallup Tribe and the sports fishermen, and to

adopt a program of management of the resource in the interest of conservation. Puyallup Tribe, Inc. v. Department of Game, 391 US 392, 88 S Ct 1725, 20 L Ed 2d 689 (1968) (Puyallup I); Department of Game v. Puyallup Tribe, Inc., 414 US 44, 94 S Ct 330, 38 L Ed 2d 254 (1973) (Puyallup II).

A recent Ninth Circuit decision in which these intervenors were not parties has determined that the Puyallup reservation sold in 1903, and now covered with private land holdings in the city of Tacoma, continues to exist. U.S. v. Washington, 496 F 2d 620 (9th Cir 1974); cert den 419 US 1032 (1975). Another case in which these intervenors were not parties at trial provides for this allocation of salmon on the Puyallup River to the Puyallup Tribe: (a) 50% of all the salmon that reach the Puyallup River ("usual and accustomed grounds and stations") and whose escapement is not necessary to preserve the run,

plus (b) all salmon caught for subsistence, plus (c) all salmon caught for ceremonial purposes, plus (d) all salmon caught with hook and line in sports fishing season, plus (e) all salmon caught as part of the regular commercial fishery (in the ocean), plus (f) all salmon caught on the reservation, plus (g) compensatory fish for all salmon originating in Washington waters which are caught in the ocean by American non-treaty commercial fishermen. U.S. v. Washington, 384 F Supp 312 (W.D. Wash 1974); aff'd 520 F 2d 677 (9th Cir 1975), cert den 96 S Ct 877.

Most of the commercial fishery is for salmon. The total annual steelhead catch in Washington of 246,000 compares with the salmon catch of 7,777,000 (Tr 210). The federal courts have given to the Puyallup Tribe most of the salmon fishery of the Puyallup River. The steelhead fishery on the

Puyallup River which is at issue here is comparatively small (Tr 943, 1061).

In this case, Superior Court Judge Brown held in accordance with the concurring opinion of this Court which was not questioned by the majority opinion that (to quote Mr. Justice White):

> ".....the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen."
> (Department of Game v. Puyallup Tribe, 414 US 44, 49 (1973))

Judge Brown found that the hatchery fish are distinguished by a stubbed dorsal fin (due to crowded conditions in the hatchery) and different growth rings on the fish scales (since hatchery fish usually migrate to the ocean at the end of one year of life instead of two years), (Finding XI; Tr 106, 176, 574). Though hatchery fish cannot be distinguished until caught, they can be

statistically separated by proportion in the total run.

Judge Brown found that the average annual run of steelhead on the Puyallup River consists of 14,715 hatchery fish and 14,715 natural fish by taking the average run during a 10-year period when there was adequate Indian reporting. Allowing a 50% escapement of natural steelhead for conservation purposes, he allocated the Puyallup Tribe 45% of the natural harvestable run, or 3,310 steelhead. He retained continuing jurisdiction of the case. (Findings XII, Ex 74-2, Tr 357).

The Puyallup Tribe appealed from the Superior Court decison. The Department of Game and Northwest Steelheaders cross-appealed solely from that part of the decision in which the court made a specific allocation of the natural run, rather than setting guidelines for an annual allocation

by the Department of Game, subject to court review.

The Supreme Court of Washington en banc unanimously affirmed Judge Brown except that it ordered the Department of Game rather than the Superior Court to determine the numbers of natural run steelhead to be included in the Puyallup Tribe allocation for future years. Department of Game v. Puyallup Tribe, Inc., 86 Wash 2d 664, 548 P 2d 1058 (1976).

The majority opinion of Justice Hunter stressed:

(1) The Treaty language "in common with all citizens of the territory" in accordance with the opinion of this Court in Puyallup I, does not grant to the Puyallup Tribe any specific allocation of steelhead on the Puyallup River but rather guarantees the members of the tribe who were not then citizens equal rights with citizens. This is supported by the language of this Court in Puyallup I "that any ultimate findings on

the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with'." Otherwise citizens who are Indians would be favored over citizens who are not Indians, in violation of the equal protection clause.

(2) The hatchery steelhead which are paid for with the earmarked license fees and tags of sports fishermen should be excluded from the commercial fishery of the Puyallup Tribe both as a matter of treaty interpretation and equity. The treaty did not contemplate Indian rights in artificially propagated fish since none then existed. Furthermore, providing hatchery fish for the commercial nets of the Puyallup Tribe would be a subsidy from the sportsmen who pay for the hatchery program.

(3) Then recognizing that the opinion of this Court in Puyallup II unless changed mandates an allocation, the decision of the

Superior Court that 45% of the natural run should be awarded to the Puyallup Tribe is affirmed as a matter of equitable discretion.

(4) The state of Washington has the duty of managing the entire steelhead resource of the Puyallup River in the interest of conservation.

The concurring opinion of Chief Justice Stafford stresses that this Court has mandated an allocation of the steelhead resource and then agrees with points (2), (3), and (4) above.

The concurring opinion of Justice Rosellini agrees with point (1) above, and stresses that the treaty language "in common with" means a fair opportunity to catch fish and not any specific allocation. He also notes that management of the steelhead resource in the interest of conservation allows regulation of the

manner of fishing, rather than solely assuring an adequate escapement.

After the decision of the Washington Supreme Court the Puyallup Tribe stated that it would seek certiorari against both the exclusion of the hatchery steelhead from the treaty commercial fishery and state regulation of the entire steelhead run on the Puyallup River because the river runs through the reservation.

Thereafter the Puyallup Tribe and others sought and obtained from the United States District Court for the District of Washington at Tacoma an order enjoining the state of Washington from excluding the hatchery steelhead on the Puyallup River from the treaty commercial fishery(App A).The federal court announced that it would retry the same issue that had been tried for ten days before the Washington Superior Court and affirmed by the Washington Supreme Court

in this case! Northwest Steelheaders and Gary Ellis are parties in this case but were denied intervenor status in the federal court case.

When the Puyallup Tribe filed its petition for certiorari in this case they did not seek review of the exclusion of the hatchery steelhead from the treaty fishery since they had obtained an injunction on this issue from the federal court.

Northwest Steelheaders and Gary Ellis now ask this Court to review the entire decision of the Supreme Court of Washington in Puyallup III, not just the one aspect singled out by petitioners. In addition to the Reasons for Granting the Writ discussed below, this response is filed because of the

failure of the Puyallup Tribe to include the hatchery fish issue in their petition for certiorari. It is further filed because the decision of the Supreme Court of Washington in this case has now been effectively reversed by the United States District Court for the Western District of Washington at Tacoma in a proceeding in which we were not allowed to intervene.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTORY

This is not a civil rights case. We are not here faced with the equal protection of the laws problem implicit in every civil rights case. Rather we are concerned with defining the special protection afforded by the treaties.

This is a conservation case. We are dealing with the protection of a diminishing resource of immense value. We respectfully urge this Court to consider the counter-

petition for certiorari with this in mind.

The management of the anadromous fishery of the state of Washington is now in chaos as a result of conflicting decisions of state and federal courts. United States District Court Judge George Boldt has issued an injunction against the state of Washington carrying out the decision of the Supreme Court of Washington in this case! He has issued injunctions requiring the state of Washington to disobey state court injunctions dealing with the allocation of the non-treaty Indian share! Judge Boldt has enjoined the state of Washington from obeying the International Salmon Treaty between the United States and Canada!

The issues that separate the state and federal courts involve the proper interpretation of the decision of this Court in Puyallup I and Puyallup II. They are the

four questions presented in this counter-petition for certiorari: (1) the role of the state in management of the resource; (2) the exclusion of the hatchery fish from the treaty fishery; (3) the allocation of fish among user groups; and (4) the proper definition of conservation in fish management.

This case returned to the courts of Washington upon remand from the decision of this Court in Puyallup II. By accepting certiorari in this case this Court can determine whether its instructions were carried out correctly. This will necessarily resolve the state and federal differences that now exist.

II. THE DECISION OF THE SUPREME COURT OF WASHINGTON IN THIS CASE IS IN DIRECT CONFLICT WITH THE DECISIONS OF JUDGE BOLDT AS AFFIRMED BY THE NINTH CIRCUIT IN UNITED STATES v. WASHINGTON, 384 F Supp 312 (WD Wash, 1974); aff'd 520 F 2d 677 (9th Cir 1975); cert den 96 S Ct 877.

The decision of the Supreme Court of Washington had not yet been rendered at the time that this Court denied certiorari in United States v. Washington, so the conflict between the highest court of the state and the highest court of the circuit did not then exist. It does now.

The differences between the state and federal courts, as well as a comparison with the holdings of this Court in Puyallup I and Puyallup II and the actual effect of the conflict, can best be shown by the chart that appears in Footnote 1.

III. THE CONFLICT BETWEEN THE DECISION OF THE WASHINGTON SUPREME COURT IN THIS CASE AND THE DECISION OF JUDGE BOLDT AS AFFIRMED BY THE NINTH CIRCUIT IN UNITED STATES v. WASHINGTON IS JEOPARDIZING THE CONSERVATION OF THE RESOURCE WHICH IS NECESSARY FOR ALL.

Judge Cochran in the first trial in this case (Finding XV) and Judge Brown in the second trial in this case (Conclusion IX) have held that state regulation of

Puyallup Tribe fishing is necessary for conservation.

Here are some of the facts in this record which support the finding:

(A Ramona Bennett the chairperson of the Tribe testified:

(1) The Tribe has no enforcement officers (Tr 78).

(2) The Tribe has no direct reporting of the Indian catch; the only reporting is from the commercial fish buyers (Tr 784, 811).

(3) The Tribe does not know what the average catch is (Tr 798).

(4) The Tribe does not know how many fish escape to spawn (Tr 822).

(5) The only evidence of overfishing used by the Tribe is poor catches as reported by its fishermen (Tr 767).

(6) 1971 tribal fishing regulations were still in effect at the time of trial (May and June 1974) (Tr 777).

(7) The Tribe has waived its regulations when requested by its fishermen (Tr 781).

(8) Every requested Indian fishery has been recognized and approved by the Tribe (Tr 782).

(9) The Indian fishermen themselves report violations (Tr 781).

(10) The Tribe wants to increase its steelhead catch 1,000 each year though they have no studies of future run sizes (Tr 788-790).

(11) The Tribe did continue fishing past the January 17, 1974 closing date set by the Department of Game for fishing by this Tribe (Tr 787).

(B) Hank Adams, the fisheries management coordinator of the Tribe testified:

(1) He has no courses in fishing management (Tr 926).

(2) His future plans do not specifically

include direct reporting of fish catches by Tribal fishermen (Tr 903).

(3) He says the Tribal fishermen "would not necessarily" disregard the escapement and sports catch in determining the amount of their harvest (Tr 920).

(4) He says that the 1971 Tribal regulations require an official list of fishermen with a registration card, but he has not made up that list because new regulations will be made up (Tr 924).

(5) The list of Tribal fishermen furnished by the witness Adams included some names typed in April or May, 1974, and some added in ink during the noon hour recess in his testimony at trial (Ex 74-29; Tr 934).

(C) James Heckman of the U.S. Fish and Wildlife Service testified:

(1) In 1971 the State Department of Fisheries and his federal agency both recommended that the Tribe reduce the

chinook salmon season by two days each week in the interest of conservation and the Tribe only reduced it by one day (Tr 1030, 1031).

(2) In 1973, the State Department of Fisheries recommended a reduction in chinook salmon fishing in the interest of conservation and the Tribe refused (Tr 1034).

The pattern that emerges is that the commercial tribal fishermen really do what they want to do without any independent control by the Tribe. But self regulation by any commercial group is not adequate to protect a fragile resource.

Even if the Puyallup Tribe had adequate regulation in the interest of conservation (which they do not on this record) the threat of multiple management of the same resource remains. This is eloquently discussed by this Court in the treaty fishing case, Kennedy v. Becker, 241 US 556,

36 S Ct 705, 60 L Ed 1166 (1916), where the Court rejected dual control of the resource by a Tribe and the state, saying:

> "Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both."

There must be one independent state agency, the Department of Game, with the authority to regulate all steelhead fishing on the Puyallup River.

Fisheries management is a very important science at the University of Washington and 106 schools through the country. ROYCE, INTRODUCTION TO THE FISHERY SCIENCES, Preface I, X (1972). Regulatory decisions must be made by experts exercising great care. A mistaken prediction of escapement needs may show no effect at the time, but result in extinguishing an entire run after two or three life cycles have been completed. CRUTCHFIELD AND PONTECORVO, THE PACIFIC

SALMON FISHERIES, A STUDY OF IRRATIONAL CONSERVATION, 167. For example, starting in 1880 in Southern California mistaken estimates of escapement needs and overfishing by commercial fishermen virtually eliminated salmon in that area of the state. NETBOY, THE SALMON, THEIR FIGHT FOR SURVIVAL (1974). Run size can change dramatically from year to year as can the amount of water in the river. Conservation requires that certain techniques of harvesting fish be avoided regardless of the numbers.

James Heckman, the expert witness for the Puyallup Tribe in this case also stressed that conservation includes maintenance of the habitat of the specie, which requires adequate water supply, egg incubation areas, food and shelter (Tr 677, 678).

Though predictions can be made ahead of time, a run cannot be accurately estimated

until it is about to enter a river and then management decisions have to be made quickly. The Department of Game with a total staff of 468, including many trained biologists, can provide the required expertness. (Annual Report of Department of Game, July 1, 1972 - June 30, 1973).

Good conservation management requires wise use of the resource to the benefit of all of the users now and in the future.

When the federal courts limit the definition of conservation to adequate escapement they are holding that the following conservation needs are beyond the regulatory power of the state of Washington:

1. Regulating mesh size in salmon fishing which can prevent an incidental catch of the steelhead which are smaller.

2. Regulating the timing of a fishing season which can prevent the

depletion of already threatened wild native stock, since they may enter a river at slightly different times than hatchery fish.

3. Preventing underfishing which can damage a run by increasing the competition among the fish for spawning areas.

4. Preventing certain techniques of harvesting fish, such as dynamite charges which cause waste, and the fish wheel, which has the potential of totally eliminating a run on a particular river.

5. Requiring the removal of nets from the water periodically, so that fish will not be wasted.

6. Varying fishing opportunities in different years, since on some runs all fish should escape for spawning, while on other rivers the run is so large that 85% or more can be safely harvested.

7. Preventing all fishing at the

mouth of hatcheries when this would deplete the returning run necessary for the continuation of the hatchery program. VAN CLEVE AND JOHNSON, MANAGEMENT OF THE HIGH SEAS FISHERIES OF THE NORTHEASTERN PACIFIC, 17 (1963); ROBINSON AND ROLLINS, MANAGING AQUATIC RESOURCES, OUR CHANGING FISHERIES 136 (1971).

The federal court decisions in U.S. v. Washington allow management by a non-expert (a federal judge) or by multiple user groups (the self-regulating tribes). What is needed is expert, unified, independent management by the state of Washington respecting all treaty rights as defined by this Court. The present bad fish management due to the federal decisions cannot be good law.

IV. THE CONFLICT BETWEEN THE DECISION OF THE WASHINGTON SUPREME COURT IN THIS CASE AND THE DECISION OF JUDGE BOLDT AS AFFIRMED BY THE NINTH CIRCUIT IN U.S. v. WASHINGTON IS UNDERMINING THE RIGHTS OF THE STATE, AS GUARANTEED BY THE TENTH AMENDMENT.

The United States Constitution provides in the Tenth Amendment that:

> "Powers reserved to states or people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The state of Washington entered the Union in 1889 with every right of the thirteen original states.

Puyallup I as later approved by Puyallup II, states:

> "The overriding police power of the State expressed in non-discriminatory measures for conserving fish resources, is preserved." (391 US 392 at 398-399 (1968))

Similar decisions were made by this Court in 1876, 1891, 1896, 1905, 1916, 1924, 1942, and 1962. McCready v. Virginia, 94

US (4 Otto) 391, 24 L Ed 248, (1876); Manchester v.Massachusetts, 139 US 240, 11 S Ct 559, 35 L Ed 159 (1891); Ward v. Race Horse, 163 US 504, 16 S Ct 1076, 41 L Ed 244 (1896); U.S. v. Winans, 198 US 371, 25 S Ct 662, 49 L Ed 1089 (1905); Kennedy v. Becker, 241 US 556, 36 S Ct 705, 60 L Ed 1166 (1916); Lacoste v. Dept. of Conservation, 263 US 545, 44 S Ct 186, 68 L Ed 437 (1924); Tulee v. Washington,315 US 681, 62 S Ct 862, 86 L Ed 1115 (1942); Organized Village of Kake v. Egan, 369 US 60, 82 S Ct 680, 7 L Ed 2d 573 (1962).

Contrary to these ten decisions of this Court, the Ninth Circuit held that the state of Washington cannot in perpetuity regulate treaty fishing even when limited to "the interest of conservation" without the "ADVANCE JUDICIAL SCRUTINY" of the District Court. The Tenth Amendment reservation of the sovereign power of Washington

becomes a recommending function. As to certain "self-regulating" tribes, the Ninth Circuit goes further and says that their fishing may be regulated by no one.

The Puyallup cases require that state "regulation meets appropriate standards and does not discriminate against the Indians." (391 US 392 at 398) The District Court and Ninth Circuit in U.S. v. Washington did not define appropriate standards for state regulation as mandated by this Court. Instead, they took away the right of Washington to manage its salmon and steelhead resource.

In the case of Milliken v. Bradley, 418 US 717, 94 S Ct 3112, 41 L Ed 2d 1069 (1974), this Court struck down a school desegregation plan which would have required perpetual regulation by the District Court. This Court there stresses:

> "But it is obvious from the scope of the inter-district remedy itself that absent a complete restructuring of the laws of Michigan relating to school districts the District Court will become first, a de facto 'legislative authority' to resolve these complex questions, and then the 'school superintendent' for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives." (418 US 717, at 743, 744)

The dissent of Mr. Justice Marshall in Milliken v. Bradley agrees that the District Court should not become a school superintendent, and argues that such usurpation of power will not occur on the facts of that case. The dissent states:

> "Our cases, of course, make clear that the initial responsibility for devising an adequate desegregation plan belongs with school authorities, not with the District Court. The court's primary role is to review the adequacy of the school authorities' efforts and to substitute its own plan only if and to the extent they default." (418 US 717, at 810)

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"Furthermore, there is no basis whatever for assuming that the District Court will inevitably be forced to assume the role of legislature or school superintendent. Were we to hold that it was its constitutional duty to do so, there is every indication that the State of Michigan would fulfill its obligation and develop a plan which is workable, administrable, financially sound and, most important, in the best interest of quality education for all of the children in the Detroit metropolitan area."
(418 US 717, at 810, 811)

The Ninth Circuit's ratification of a perpetual fishmaster for western Washington is thus contrary to both the majority and dissenting opinions in the Milliken v. Bradley case. It does not give the state of Washington the opportunity of developing a proper plan for protecting Indian treaty rights as defined by this Court.

The basic thrust of the Ninth Circuit decision is that the state of Washington cannot be trusted to protect Indian treaty rights. The suggested solution is to turn

over management of the anadromous fishery to the federal government. The decision of the Supreme Court of Washington in our case is directly contrary to the Ninth Circuit.

V. THE QUESTION FOR CERTIORARI PRESENTED BY THE PUYALLUP TRIBE OF THE RIGHT OF THE STATE TO MANAGE THE ENTIRE PUYALLUP RIVER INCLUDING THE RESERVATION FISHERY,CAN ONLY BE MEANINGFULLY REVIEWED BY THIS COURT IN THE CONTEXT OF THE COMPLETE DECISION OF THE WASHINGTON SUPREME COURT AND THE CONFLICT BETWEEN THE STATE AND FEDERAL DECISIONS.

The Puyallup reservation was reinstated in 1974 by the Ninth Circuit in a case in which Northwest Steelheaders and Gary Ellis were not parties, U.S.v. Washington, supra. It is not geographically defined by that court but probably includes the first seven miles of private land in the city of Tacoma bordering the Puyallup River.

The Ninth Circuit opinion in the later U.S. v. Washington case says that no

one can regulate an Indian reservation or the tribal fish catch on the reservation. Since the Puyallup reservation is at the mouth of the river, this means that the tribal fishermen could take all of the steelhead. The Puyallup petition for certiorari justifies this result by citing cases giving tribes exclusive control over reservation activities such as adoptions. See for example, Fisher v. District Court, 424 US 382, 96 S Ct 943, 47 L Ed 2d 106, reh den 96 S Ct 1524 (1976).

The concurring opinion below of Chief Justice Stafford after discussing such cases, distinguishes them in this way:

> "On the other hand, it is only logical to assume the Supreme Court is equally aware of the above cited cases and had them in mind when the following broad language was used in Puyallup II at page 49:
>
> > The aim is to accommodate the rights of Indians under the Treaty and the right of other people.

> > We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets. (Italics mine.)
>
> "When one considers the fragile nature of the fishery involved, as well as the State's physical and financial support of that resource, it is easy to understand the above quoted language. If the Supreme Court has not recognized the existence of a State power to control and supervise the mandated allocation, the Supreme Court's direction would, for all practical purposes, be impossible to establish, implement, and enforce. Without question the Supreme Court did not intend to direct the State of Washington to perform a useless act." (Department of Game v. Puyallup Tribe, Inc., 548 P 2d 1058 at 1075)

The concurring opinion of Justice Rosellini also adds that if there was any intention in the treaty with the Puyallups of giving them exclusive control over the reservation fishery this could have been stated. He points out that:

> "A treaty signed in June 1855 in Walla-Walla Valley between the United States and the Walla-Walla Tribe, 12 Stat. 945, 946, illustrates that the Indians and United States were capable of using explicit language when it was desired to give exclusive rights to Indians to fish. Article 1 of the treaty says
>
> [t]hat the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them.

> "It can be seen that in the Walla-Walla Treaty, the Indians reserved the exclusive right to take fish from streams running through and bordering said reservation and outside their reservation in common with the citizens of the United States. There was no difficulty in selecting the words to convey the separate ideas of "exclusive rights" and "rights secured in common" with the citizens of the United States." (548 P2d 1058 at 1076-77)

In U.S. v. Washington, District Court Judge Boldt first said that the reservation fishery could not be regulated, but then changed his mind one year later and said on February 26, 1975:

> "The Court has concluded that determination of the on-reservation and off-reservation shares of the catch should be based on historical data to the extent available." (Memorandum Decision and Order Re Nisqually River Chum Salmon and Steelhead Fisheries)

Can a user group, such as sports fishermen, create a treasured recreational resource with their own money without having that treasure taken away by others? If the hatchery fish spent their entire life in

wholly owned ponds, it is unquestioned that no one else could legally deplete the supply. Murphy v.Hitchcock, 22 Hawaii 665 (1915); Camp Clearwater, Inc. v Plock, 52 NJ Super 583, 146 A 2d 527 (1958), aff'd 157 A 2d 15 (1959), Annot. 57 ALR 2d 569, 587. There is no reason why the right to these artificially propogated hatchery plants cannot be maintained when they are released in a public river. An analogy might be found in grazing law. The ownership of cattle remains in its owner no matter which land is used by the cattle for grazing. Fick v. Parman, 71 Nev 201, 284 P 2d 380 (1955); Stewart v. Hunter, 16 Or 62, 16 P 876 (1888).

There are other areas of law where a landowner may not own what crosses his land. The water in an artificial ditch is the personal property of the ditch builder and the landowners around the

ditch have no riparian water rights and must give it safe passage through their land. Methow Cattle Co. v. Williams, 64 Wash 457, 117 P 239 (1911); Madison v. McNeal, 171 Wash 669, 19 P 2d 97 (1933).

The steelhead spawn upstream in the Puyallup River system, go downstream through the reinstated reservation and out to the ocean where they spend most of their life. They then return to the river and swim upstream to spawn near their point of origin. The question presented by the Puyallup Tribe of the extent to which tribal nets can block that passage cannot be considered in isolation. If the state has the responsibility of managing the resource it must manage the entire fishery, not just a portion. If hatchery steelhead are not the property of the treaty Indians they must be

allowed to pass through the reservation uncaught. Whether the words "in common with all citizens of the territory" means a fair opportunity or a specific allocation, in either case fish caught within the reservation need to be included. And the need to conserve the steelhead resource involves control of the method and timing of fishing on the entire river.

CONCLUSION

The majority opinion of the Washington Supreme Court in this case holds a major portion of its ruling in abeyance, pending review by this Court.

In an even more recent decision, the Washington court almost pleads with this Court to review this case. In Washington State Commercial Passenger Fishing Vessel Association v. Tollefson, 87 Wash 2d 417, 553 P 2d 113 (August, 1976),

the court says:

> "Another question not considered in the briefs arises from the fact that this court has itself interpreted one of the treaties in question and has arrived at a conclusion as to its meaning which differs from that of the federal court. Department of Game v. Puyallup Tribe, Inc., 86 Wn2d 664, 548 P2d 1058 (1976). To which of these interpretations must the state agency respond? The resolution of this question cannot come from this court or from the federal district court, if no definitive authority upon the subject exists. It must come from a higher court whose decisions are binding upon both of us. In short, this dilemma can be resolved only by the Supreme Court of the United States, which, we understand, has been asked to take jurisdiction of the cases involved and settle the question." (87 Wn 2d 417, at 421)

This Court should take jurisdiction and settle the question.

Respectfully submitted,

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Federal Court Injunction (8/13/76)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al, Plaintiffs, vs. STATE OF WASHINGTON, et al, Defendants	CIVIL NO. 9213 ORDER GRANTING PRELIMINARY INJUNCTION

Dr. Whitney, Technical Advisor to the Court, advises that it is highly desirable for all concerned that the Court's decision on the Motion for a Preliminary Injunction be determined prior to August 15, 1976.

The Court has fully considered all of the issues, contentions and Proposed Findings of Fact and Conclusions of Law submitted by the parties pertaining to the so-called "hatchery issues."

Typing of the Findings of Fact, Conclusions of Law and rulings of the Court on all issues is in progress and will be completed, filed for entry with the Clerk and distributed to counsel for all parties, Monday, 8/16/76.

For the reason above stated, the Court hereby holds, finds and orders that the Temporary Restraining Order,entered 7/14/76 and by agreement of all parties continued in effect until further order of the court, be hereby replaced by a Preliminary Injunction providing as follows:

Federal Court Injunction (8/13/76)

The Defendant State of Washington, including its Directors of Fisheries and Game, and all other officers, employees, agents and attorneys of each are restrained and enjoined from basing the determination of numbers of harvestable fish which Treaty Indians shall have the opportunity to take pursuant to this Court's previous decisions, on anything other than the total estimated runs of free-swimming fish, including those resulting from hatchery or other artificial propagation or transplanting programs. This order applies to the entire case area, each of the tribes, and all of the waters within the case area.

This injunction shall continue in effect until further order of the Court after entry of final determination in Phase II.

IT IS SO ORDERED this 13th day of August, 1976.

/s/ George H. Boldt
GEORGE H. BOLDT
SR. UNITED STATES
DISTRICT JUDGE

Complaint in Intervention

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,	No. 158069
Plaintiff,	COMPLAINT OF INTERVENOR-PLAINTIFFS NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED AND GARY ELLIS
NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED and GARY ELLIS,	
Intervenor-Plaintiffs,	
v.	
PUYALLUP TRIBE, INC., et al,	
Defendants.	

Intervenor-Plaintiffs allege:

I

Trout Unlimited is a nationwide non-profit corporation incorporated in Michigan and authorized to do business in the State of Washington with over 18,000 members throughout the United States and has as one of its primary purposes, the conservation of fish.

II

Northwest Steelheaders Council of Trout Unlimited is the regional council of Trout Unlimited in the Pacific Northwest and has

over 5,000 members in the Pacific Northwest, including about 3,000 members in the State of Washington of whom about 500 live in Pierce County, Washington. Chapters are located in Tacoma and Puyallup in Pierce County and other chapters are located in Bellevue, Bremerton, Seattle, Everett, Aberdeen, Spokane, Chehalis, Hazel Dell, Longview Kelso, Sunnyside, North Seattle, Bothell, Olympia, Port Angeles, Mt. Vernon, Lynnwood, Federal Way, Renton, Wenatchee, Vancouver, Camas-Washougal and Yakima.

III

Most of the members of the Tacoma and Puyallup chapters are licensed sports fishermen in the State of Washington, have paid $2.00 each for punch cards entitling them to fish for steelhead trout in the State of Washington, and do regularly fish for steelhead trout in Commencement Bay and the Puyallup River and its tributaries (all referred to herein as the Puyallup River system in Pierce County, Washington.)

IV

Steelhead trout is a game fish under the laws of the State of Washington.

V

Gary Ellis is a citizen of the State of Washington, a resident of the City of Tacoma in Pierce County, Washington, over the age of 21 years, and the Washington State president of the Northwest Steelheaders Council of Trout Unlimited. He is a steel-

head fisherman, holds a valid current license from the State of Washington permitting him to engage in this activity, and customarily fishes for steelhead trout in the Puyallup River system.

VI

Approximately 12,000 to 14,000 steelhead trout are caught by licensed sports fishermen in the Puyallup River system each year and a significant number are caught by members of the Northwest Steelheaders Council of Trout Unlimited, especially members of the Tacoma and Puyallup chapters. Sports fishermen retain steelhead trout that they catch for their own use. If the steelhead trout caught by sports fishermen on the Puyallup River system each year were sold, the value of this fish would be about $130,000.

VII

Most of the steelhead trout in the Puyallup River system come from hatcheries. Most of the cost of the hatcheries program is financed by the license fees of sports fishermen, including the license fees of members of Northwest Steelheaders Council of Trout Unlimited.

VIII

The decision of the United States Supreme Court in this case entered November 19, 1973, provides that members of Puyallup Tribe, Inc. have a right to fish commercially for steelhead trout in the

Complaint in Intervention

Puyallup River system and the Supreme Court directs that the matter be remanded to this court to apportion the steelhead trout in the Puyallup River system between Puyallup Tribe, Inc. and the sports fishermen, to find whether the Indian treaty fishing right extends to the hatchery fish paid for by the sportsmen, and to determine a reasonable program of regulation by the Department of Game of the State of Washington consistent with the decision.

IX

Reasonable regulation of the catch of steelhead trout and the time and method of taking in the Puyallup River system by the Department of Game of the State of Washington after consultation with Puyallup Tribe, Inc. and other interested parties is necessary for the conservation of the resource.

X

Sports fishermen are entitled to those steelhead trout in the Puyallup River system originating in the hatcheries because the hatchery program is funded by sportsmen's license fees and excise taxes paid by sportsmen on fishing equipment.

XI

Puyallup Tribe, Inc. and its members are entitled to such portion of the natural run of steelhead trout in the Puyallup River system as this court should deem just and equitable.

Complaint in Intervention

WHEREFORE, Intervenor-Plaintiffs pray for a decree of this court providing as follows:

1. The Department of Game of the State of Washington after consultation with Puyallup Tribe, Inc. and other interested parties is directed to establish reasonable regulation of the catch of steelhead trout and the time and method of taking in the Puyallup River system.

2. Sports fishermen are entitled to those steelhead trout in the Puyallup River system originating in the hatcheries.

3. Puyallup Tribe, Inc. is entitled to such portion of the natural run of steelhead trout in the Puyallup River system as this court should deem just and equitable.

4. Such other relief as this court should deem just and equitable.

RIDDELL, WILLIAMS, VOORHEES, IVIE & BULLITT

By_____
Vincent R. Larson

WILLNER, BENNETT, MEYERS, RIGGS & SKARSTAD

By_____
Don S. Willner

Attorneys for Intervenor-Plaintiffs Northwest Steelheaders Council of Trout Unlimited and Gary Ellis

(April, 1974)

Questions Presented	This Court in Puyallup I	This Court in Puyallup II	9th Circuit in U. S. v. Washington	Washington Supreme Court in This Case Puyallup III	Actual Effect of Conflict upon Management of the Anadromous Fish Resource in the Western District of Washington
1. Right of the State to Manage the Resource.	"And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power . . . But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians . . . The overriding police power of the State, expressed in non discriminatory measures for conserving fish resources, is preserved." 391 U.S. 392 at 398, 399 (1968)	- - - - - - - - - -	"Therefore, the district court wisely insisted that proposed state regulations be submitted to it for approval before being enforced as to treaty Indians." 520 F.2d 676 at 687 (1975)	The state of Washington is to manage the entire steelhead resource of the Puyallup River in the interest of conservation.	On the Puyallup River at the present time the: 1. Yakima Tribe may self-regulate its own fishery; 2. Muckleshoot Tribe fishery is regulated by Judge Boldt; 3. steelhead fishery of the Puyallup Tribe is regulated by the Washington Superior Court though Judge Boldt has enjoined the Department of Game (but not the Superior Court) from excluding hatchery fish; 4. salmon fishery of the Puyallup Tribe is regulated by Judge Boldt; 5. salmon fishery of non-treaty fishermen is regulated by the State after its regulations are approved in advance by Judge Boldt; 6. steelhead fishery of non-treaty fishermen is regulated by the State (according to the Washington Supreme Court) or by Judge Boldt (according to Judge Boldt).
2. Exclusion of Hatchery Fish from the Treaty Fishery.	- - - - - - - - - -	"We know from the record and oral argument that the present run of steelhead trout is made possible by the planting of young steelhead trout called smolt and that the planting program is financed in large part by the license fees paid by the sports fishermen." Majority op., 414 U.S. 44 at 47 (1973) . . . the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen." 414 U.S. at 49	- - - - - - - - - -	"We hold therefore that the Puyallup Indians have no rights in the hatchery run of steelhead other than those enjoyed by all citizens of the state." 548 P.2d 1058 at 1072 (1976)	On the Puyallup River the Superior Court is excluding the hatchery steelhead from the treaty fishery while the state of Washington (but not the Superior Court) is under federal injunction to include the hatchery fish in the treaty fishery. But under the limited definition of conservation adopted by the federal court, the Nisqually and Puyallup tribes can place nets across the entrance and block the Washington State South Tacoma Hatchery on Chambers Creek which is the source of the hatchery steelhead for the Puyallup River.
3. The Allocation of Fish to Treaty Fishermen.	- - - - - - - - - -	"Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables — the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like." 38 L. Ed.2d 254 at 258 (1973)	(a) 50% of all the salmon that reach the Puyallup River ("usual and accustomed grounds and stations") and whose escapement is not necessary to preserve the run, plus (b) all salmon caught for subsistence, plus (c) all salmon caught for ceremonial purposes, plus (d) all salmon caught with hook and line in sports fishing season, plus (e) all salmon caught as part of the regular commercial fishery (in the ocean), plus (f) all salmon caught on the reservation, plus (g) compensatory fish for all salmon originating in Washington waters which are caught in the ocean by American non-treaty commercial fishermen.	". . . the Indians share equally, i.e., in common with other citizens, the public right to fish and, in addition, are guaranteed access to certain fishing locations." Majority opinion, 548 P.2d 1058 at 1068 "Moreover, we feel constrained by the express language on the face of Puyallup II, when considered independent of Puyallup I, to defer to the statement in Puyallup II, recognizing an Indian right to a net fishery. Therefore, pending an ultimate disposition of this issue by the United States Supreme Court, we will follow Puyallup II and undertake a consideration of the allocation question expressly called for by that case." Majority opinion, 548 P.2d 1058 at 1070	Since the reservation is the first seven miles of the river, and since the federal court does not limit the manner of fishing, this means according to the Ninth Circuit that the Puyallup Tribe could put a fish trap across the river within their reservation and take *all* the fish. The concurring opinion of Justice Rosellini points out that under Judge Boldt as perpetual fishmaster, the following occurred in December, 1975: ". . . the Indians caught 2,476 fish on the Puyallup River, while 1,341 sportsmen fishing by line and hook caught only 102. In Western Washington Green River, 12,000 non-Indians caught only 50 fish, while Indian netters took 4,839. On the Skagit River, 893 sportsmen caught 89 fish while the Indians netted 2,367 fish." 548 P.2d 1058 at 1079.
4. The Definition of Conservation.	This case rejects the limitation that ". . . the particular regulation sought to be imposed is 'indispensable' to the accomplishment of the needed limitation." Instead it holds that ". . . the power of the State was to be measured by whether it was necessary for the conservation of fish." 391 U.S. 401-402, fn. 14	- - - - - - - - - -	"But the only rationale for permitting state interference with Indian fishing precludes adoption of this definition and restricts the meaning of conservation to insuring optimum spawning escapement for perpetuation of the run." 520 F.2d at 686	"Conservation means the wise use of the resource, and in the management of steelhead there must be necessary escapement for needed spawning to ensure the perpetuation of the resource. The manner of fishing must be such that it can be controlled so it does not impair or damage the necessary escapement; and, further, the manner of fishing itself must not be destructive." Concurring op., Justice Rosellini, 548 P.2d 1058 at 1079	The federal court has ruled that eleven Washington conservation statutes which apply to all other citizens of the state could not be enforced against the Puyallup Tribe or any other treaty Indian fishermen. This means, for example, that under the federal court ruling the Puyallup Tribal fishermen have the right to disobey state law and kill fish with fish wheels, poison or dynamite, so long as sufficient fish escape. The state courts are trying to enforce the good conservation practices contained in these eleven statutes.